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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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DEC 10 1996

Federal Communications Commission  
Office of Secretary

RM-8897

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In re Petition of )  
 )  
CELLULAR COMMUNICATIONS OF )  
PUERTO RICO, INC. )  
 )  
For Declaratory Ruling or Rulemaking To )  
Determine Whether Competitive Bidding )  
Procedures Should Be Used to License Certain )  
Cellular Rural Service Areas )

To: Chief, Commercial Wireless Division,  
Wireless Telecommunications Bureau

REPLY COMMENTS OF CENTURY CELLUNET, INC.

Century Cellunet, Inc. ("Century")<sup>1</sup> hereby submits its reply to initial comments on Cellular Communications of Puerto Rico's ("CCPR's") petition for declaratory ruling or, in the alternative, for rulemaking requesting that licenses for certain cellular rural service areas ("RSAs") should be granted by competitive bidding rather than by lottery. For the reasons detailed below, Century strongly supports this proposal. Utilizing auctions to award the remaining cellular RSA licenses is fully consistent with the applicable statutes and Commission precedent as well as clearly in the public interest. Moreover, in order for such auctions to be fully effective, all entities should be eligible to participate. There is no basis for excluding Interim Operating Authority licensees from this process.

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<sup>1</sup> Century, through its subsidiaries and affiliated partnerships, provides cellular service in numerous markets throughout the country. It also holds Interim Operating Authority for the Block A cellular system in the Mississippi 5 RSA.

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I. THE USE OF AUCTIONS TO AWARD THE REMAINING CELLULAR RSA LICENSES IS CONSISTENT WITH THE COMMISSION'S STATUTORY MANDATE AND PRECEDENT AS WELL AS IN THE PUBLIC INTEREST

Contrary to the assertions of the lottery proponents in this proceeding, the use of auctions to award the remaining initial cellular RSA licenses is not only plainly within the Commission's statutory auction authority, but is also consistent with agency precedent. Further, using auctions in this context instead of lotteries would clearly advance the public interest. In this regard, Century strongly agrees with the comments of Bell Atlantic/NYNEX Mobile, Inc. ("Bell Atlantic/NYNEX") and Western Wireless Corporation ("Western").

As an initial matter, it is abundantly clear that the Commission has authority to award the remaining initial cellular RSA licenses by competitive bidding. Section 309(j) is quite explicit that the Commission may use auctions where mutually exclusive applications have been filed for any initial license or construction permit to provide a communications service to the public for compensation.<sup>2</sup> This broad authority indisputably covers the RSA licenses at issue. Contrary to the suggestions of some commenters, Section 6002(e) of the 1993 Budget Act does not curtail this authority where one or more of the applications was filed prior to July 26, 1993. This provision only affords the Commission the added option of using lotteries in such cases. The authority to use auctions is not only available where applications were filed prior to July 26, 1993, but generally appears the clear preference of Congress.<sup>3</sup>

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<sup>2</sup> 47 U.S.C. §§ 309(j)(1), (2).

<sup>3</sup> This preference is apparent from the wording of Section 6002(e) as it expressly prohibits the Commission from using lotteries to award licenses after the date of enactment of the 1993 Budget Act. While the provision goes on to provide a very

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Moreover, a decision by the Commission to use auctions to license the remaining cellular RSAs would not constitute impermissible retroactive rulemaking. As detailed by Bell Atlantic/NYNEX, there is ample precedent to support the Commission's change in its license selection rules. Indeed, in a quite analogous situation, the Commission several years ago extended the then-new lottery process to initial cellular applications filed prior to the time such authority was available.<sup>4</sup> The D.C. Circuit upheld that decision, finding that the applicants had no legal right to the selection process in place at the time their applications were filed.<sup>5</sup> A similar determination is appropriate here.<sup>6</sup>

In addition to the proposed auctions falling squarely within the Commission's authority, they would also be fully consistent with the public interest. By authorizing the use of auctions and generally prohibiting random selection, Sections 309(j) and 6002(e) plainly indicate Congress' belief that auctions constitute a more efficient and effective

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limited exception to this strict prohibition where the applications were filed prior to July 26, 1993, it is significant that this exception does not mandate the use of lotteries in these cases. Rather, it appears that Congress intended the Commission also to use auctions here, but afforded the agency the additional option of using lotteries if unique circumstances so required.

<sup>4</sup> Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 F.C.C.2d 175 (1984), recon., 101 F.C.C.2d 577 (1985).

<sup>5</sup> See Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554-55 (D.C. Cir. 1987).

<sup>6</sup> As detailed by Bell Atlantic/NYNEX and Western, the fact that the Commission chose to use lotteries instead of auctions for pre-July 26, 1993 cellular unserved area applications is not determinative here. That decision was based in large part on the fact that cellular unserved areas are generally of "questionable commercial value" because they tend to be small in size and cover remote or sparsely populated areas. Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 F.C.C. Rcd 7387, 7392 (1994). This is clearly not the case with the remaining cellular RSAs, which are large, stand-alone markets that are viewed to be of significant value.

means of license selection than lotteries. Experience has shown that lotteries have "engendered rampant speculation, undermined the integrity of the FCC's licensing process and, more importantly, frequently resulted in unqualified persons winning an FCC license."<sup>7</sup> Auctions do not appear to suffer from such deficiencies. Congress and the Commission have both recognized that this selection process provides the fastest and most efficient way to bring service to the public.<sup>8</sup> Auctions not only provide a means for awarding licenses to those who most highly value them, but also allow the public to be compensated for the use of the radio spectrum -- resulting in billions of dollars for the U.S. Treasury. For such reasons, the public interest requires the use of auctions instead of lotteries in the instant situation.

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<sup>7</sup> H.R. REP. NO. 103-111, 103d Cong., 1st Sess. (1993) at 248.

<sup>8</sup> See, e.g., Improving Commission Processes, FCC 96-50, PP Docket No. 96-17, ¶ 11 (Feb. 14, 1996) ("[The Wireless Bureau] has aggressively pursued spectrum auctions as a fast, fair and efficient mechanism to issue radio licenses to the party that values them most highly and is therefore most likely to deliver service to the public expeditiously. . . . Licenses won at auction have been issued in an average of four months. In contrast, . . . cellular licenses issued through lottery were granted in approximately 14 months, and cellular licenses granted through comparative hearings were issued in approximately four years."); News, "MCI Telecommunications Corporation Bids \$682,500,000 for Last Available Nationwide DBS Slot" (Jan. 25, 1996) ("Chairman Reed Hundt said, 'Once again spectrum auctions have proven to be a win-win-win proposition. Companies receive licenses more quickly and efficiently, consumers receive the benefits of new competition, and the American taxpayer receives a fair return.'"); Amendment of Part 95 of the Commission's Rules to Modify Construction Requirements for Interactive Video and Data Service (IVDS) Licenses, 11 F.C.C. Rcd 2472 (1995) ("The use of auctions, rather than lotteries, to award licenses reduces the potential for spectrum warehousing and, . . . creates significant short-term incentives for licensees to begin service as quickly as possible."); Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use 4660-4685 MHz, 11 F.C.C. Rcd 624 (1995) ("[A]uctions will, more quickly than other licensing schemes, lead to the development and rapid deployment of new technologies, products, and services, thus satisfying the objective expressed in Section 309(j)(3)(A). . . . The licensing of PCS has proceeded far more rapidly than would have been the case if we had used comparative hearings or lotteries.").

II. AUCTIONS OF THE REMAINING CELLULAR RSAS SHOULD BE OPEN TO ALL, INCLUDING INTERIM OPERATING AUTHORITY LICENSEES

In order for any auction of the remaining cellular RSAs to be fully effective, participation should be open to all interested bidders. Such full participation would clearly serve the public interest. Much has changed in the eight years since the applications for these remaining cellular RSAs were filed. Many of the original applicants may no longer be interested in the licenses, or may not even be in existence at this time. Similarly, many other communications companies have been established or have modified their business plans so that they are now capable and interested in constructing and operating these systems. Broadening auction participation would take into account these changed circumstances -- permitting the best qualified and most highly motivated entities to be eligible, while also maximizing potential revenues for the public.

Further, the Commission is not prohibited from expanding the pool of eligible applicants for these licenses to all interested bidders. To date, at least one lottery has been conducted for each of the remaining cellular RSAs. Nothing in the Communications Act or the Commission's Rules entitles those applicants that were unsuccessful in the first lottery to one or more additional chances.<sup>9</sup>

While several commenters have tried to assert that an Interim Operating Authority licensee for a particular market should be barred from participating in the auction for that market, no basis has been provided for such an exclusion. In the auction

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<sup>9</sup> For this reason, the cut-off cases cited by several of the commenters are inapposite here as they pertain to situations where an initial selection attempt had not yet occurred.

process, an interim licensee would have no more advantage than any other bidder. The winner would simply be the party that bids the most.<sup>10</sup> Moreover, in the event that the interim operator is the high bidder, it is likely to be able to more rapidly implement comprehensive service as well as to take advantage of economies of scale (in combination with its adjacent systems), with resulting benefits for the public.<sup>11</sup> No basis has been articulated for excluding such an able participant and denying the public these potential benefits.

### III. CONCLUSION

For the foregoing reasons, Century strongly supports CCPR's proposal to grant the remaining initial cellular RSA licenses by competitive bidding instead of by lottery. The use of auctions in this context is not only permissible under the requisite statutory authority but fully consistent with the public interest. Moreover, in order for this

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<sup>10</sup> That the interim operator has specific knowledge of the market will not assist it in securing the license if another applicant bids more.

<sup>11</sup> Several commenters suggest that the fact that an interim operator certified it was not an applicant for the market now precludes it from participating in the proposed auctions. However, those certifications were limited to the previous selection process. To the extent that the Commission now revises this process to allow broad auction participation, there is no public interest reason why interim operators should remain excluded.

process to be fully effective, any such auctions should be open to all interested bidders, including Interim Operating Authority licensees.

Respectfully submitted,

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December 10, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 10<sup>th</sup> day of December, 1996, I caused copies of the foregoing Reply Comments of Century Cellunet, Inc. to be mailed via first-class postage prepaid mail to the following:

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